

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 OMARI TAYLOR,

9 Plaintiff,

v.

10 JON VANGESEN and KITSAP  
11 COUNTY,

12 Defendants.

CASE NO. C18-5682 BHS

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT'S MOTION FOR  
JUDGMENT ON THE  
PLEADINGS, GRANTING  
PLAINTIFF LEAVE TO AMEND,  
AND DENYING PLAINTIFF'S  
MOTION TO STRIKE AS MOOT

13 This matter comes before the Court on Defendant Jon VanGesen's ("VanGesen")  
14 motion to dismiss, Dkt. 19, and Plaintiff Omari Taylor's ("Taylor") motion to strike  
15 exhibits attached to the motion to dismiss, Dkt. 24. The Court has considered the  
16 pleadings filed in support of and in opposition to the motions and the remainder of the  
17 file and hereby grants in part and denies in part the motion for judgment on the pleadings  
18 and denies the motion to strike as moot for the reasons stated herein.

19 **I. PROCEDURAL HISTORY**

20 On August 20, 2018, Taylor filed a complaint against VanGesen and Defendant  
21 Kitsap County ("Kitsap County"). Dkt. 1. Against VanGesen, Taylor alleged deprivation  
22

1 of his right to equal protection under the Fourteenth Amendment, deprivation of his right  
2 to be free from unreasonable search and seizure under the Fourth Amendment, and  
3 deprivation of his right to free speech under the First Amendment, all pursuant to 42  
4 U.S.C. § 1983. Dkt. 1, ¶¶ 124–26. Against Kitsap County, Taylor alleged a violation of  
5 Washington’s Criminal Records Privacy Act, RCW Chapter 10.97. *Id.* ¶ 127. On January  
6 9, 2019, the Court entered the parties’ stipulated dismissal of the Washington Criminal  
7 Records Privacy Act claim. Dkt. 14.

8 On May 24, 2019, VanGesen filed a motion to dismiss. Dkt. 19. On June 26, 2019,  
9 Taylor filed a motion to strike exhibits attached to the motion to dismiss. Dkt. 24. On  
10 July 1, 2019, Taylor responded to VanGesen’s motion. Dkt. 25. On July 5, 2019,  
11 VanGesen replied to Taylor’s response and responded to Taylor’s motion to strike. Dkt.  
12 26.<sup>1</sup>

## 13 II. FACTUAL BACKGROUND

14 The facts relevant to the instant motion are as follows.

15 Taylor is an African-American man who resides in King County, Washington.  
16 Dkt. 1, ¶ 1. VanGesen is a white man who resides in Kitsap County and who is employed  
17 by the Kitsap County Sheriff’s Department as a deputy sheriff. *Id.* ¶ 2; Dkt. 8, ¶ 2.

18 Taylor alleges that just before 7 p.m. on September 13, 2015, he was driving  
19 northbound on California Avenue Southeast in Port Orchard, Washington on the way to  
20 visit a friend. Dkt 1, ¶¶ 9–11, 40. VanGesen, driving an unmarked Sheriff’s Office

---

21  
22 <sup>1</sup> The reply brief is docketed as the reply of Kitsap County, but signed as VanGesen’s  
reply. *Compare* Dkt. 26 as docketed in CM/ECF with Dkt. 26 at 11.

1 vehicle, passed Taylor going southbound. *Id.* ¶¶ 9–12. VanGesen looked directly at  
2 Taylor as the two cars passed each other. *Id.*

3 In his police report, VanGesen alleged that as he passed Taylor, he observed that  
4 the passenger side taillight on Taylor’s vehicle was broken and “white light was coming  
5 through the lens.” Dkt. 20 at 8; Dkt. 1, ¶ 20. Taylor alleges that while in fact a small piece  
6 was missing from the taillight cover, VanGesen could not have observed this as his  
7 vehicle passed Taylor’s because: (1) the missing piece was sufficiently small that it was  
8 only visible from a distance of 20 feet, (2) the cars passed each other travelling  
9 approximately 30 to 35 mph such that one second after they passed they would have been  
10 88 feet apart, and (3) Taylor did nothing to activate the taillight as VanGesen passed him  
11 (such as brake or signal a turn). Dkt. 1, ¶¶ 21–33.

12 VanGesen made a u-turn to follow Taylor. *Id.* ¶ 33. Taylor turned right from  
13 California Avenue Southeast onto East Van Buren Street and parked in the driveway at a  
14 friend’s home. *Id.* ¶¶ 36–40. VanGesen stopped behind Taylor’s parked car, turned on his  
15 emergency lights, and parked his car so that it blocked the driveway. *Id.* ¶¶ 41–46.

16 VanGesen then approached the driver’s side of Taylor’s vehicle. *Id.* ¶ 47. While  
17 VanGesen’s report stated that Taylor “dropped his head,” Taylor alleges this did not  
18 occur. Dkt. 20 at 8; Dkt. 1, ¶¶ 48–49. VanGesen told Taylor he had stopped him because  
19 his brake light was broken. Dkt. 1, ¶ 52. At some point, Taylor told VanGesen “we both  
20 know this isn’t about the brake light,” to which VanGesen did not respond. *Id.* ¶¶ 53–54.

21 VanGesen asked Taylor “if he lived there.” *Id.* ¶ 55. When Taylor responded that  
22 he did not, VanGesen asked him where he lived. *Id.* ¶ 55–58. Taylor did not reply

1 because VanGesen was holding Taylor’s driver’s license which listed his address. *Id.*  
2 VanGesen asked Taylor how long he had been at the address on the license, to which  
3 Taylor did not respond, and asked what brought Taylor to Port Orchard as he did not live  
4 there. *Id.* ¶¶ 58–59. Taylor replied that he was visiting someone but did not reply when  
5 VanGesen asked him if that person lived in Unit A or Unit B. *Id.* ¶¶ 59–60.

6 VanGesen then ordered Taylor to get out of the car, walk to the back of the car,  
7 and take his hands out of his pockets. *Id.* ¶¶ 61–66. Taylor alleges that he complied with  
8 these instructions. *Id.* VanGesen instructed Taylor to put his hands on the trunk of the car,  
9 step back from the vehicle, and spread his feet to be patted down. *Id.* ¶¶ 67. While  
10 VanGesen’s report claims that Taylor refused to spread his feet or move his hands along  
11 the trunk to be further from his waist, Taylor alleges he complied with VanGesen’s  
12 request. Dkt. 20 at 8–9, Dkt. 1, ¶¶ 68–70. When VanGesen used his body to force Taylor  
13 closer to the trunk of the car, Taylor told VanGesen that his use of force was  
14 unwarranted. Dkt. 1, ¶¶ 72. VanGesen then radioed for a second unit. *Id.* ¶ 72.

15 Taylor alleges that VanGesen next shoved Taylor in the chest and put his hand on  
16 his gun, to which Taylor “again protested that any use of force was unnecessary.” *Id.* ¶¶  
17 74–75. Taylor’s friend, who had been observing the interaction from her home, called  
18 911 to report that a law enforcement officer was yelling at her friend, was out of control,  
19 and asked the operator to “send someone quick before the situation got out of hand.” *Id.*  
20 ¶¶ 76–77. Taylor’s friend came outside and tried to ask VanGesen to leave Taylor alone,  
21 but VanGesen instructed her to go back inside. *Id.* ¶ 80. She complied and began filming  
22 the interaction through the front window, which VanGesen observed. *Id.* ¶¶ 81–83. When

1 Kitsap County deputy sheriff Fred Breed (“Breed”) arrived on the scene, VanGesen  
2 arrested Taylor for obstructing an officer, handcuffed Taylor with Breed’s assistance, and  
3 directed that Taylor be transported to jail. *Id.* ¶¶ 84–86.

4 Breed then interviewed Taylor’s friend in her home, who told Breed that Taylor  
5 was coming over for dinner. *Id.* ¶¶ 88–89. When asked, Taylor’s friend told Breed that  
6 Taylor did not use drugs or have any mental disorders. *Id.* ¶¶ 90–93. Breed asked the  
7 friend to show him the video she had taken of VanGesen and Taylor’s interaction and  
8 watched part of it. *Id.* ¶¶ 94–98.

9 VanGesen searched Taylor’s car and took photographs or directed other officers to  
10 take photographs. *Id.* ¶ 102. Taylor alleges that this was the first time VanGesen  
11 discovered that the taillight cover had a small piece missing. *Id.* VanGesen issued Taylor  
12 a citation for operating a motor vehicle with a defective tail lamp and operating a motor  
13 vehicle without insurance. *Id.* ¶¶ 103–104.

14 Taylor spent the night in a holding cell in the Kitsap County Jail and was released  
15 the next day after the Kitsap County Prosecuting Attorney’s office declined to file  
16 criminal charges. *Id.* ¶¶ 105–106, 122. On October 14, 2015, Kitsap County charged  
17 Taylor with one count of obstructing a law enforcement officer based on the September  
18 14, 2015 incident. Dkt. 20 at 5–6. On December 24, 2015, the Kitsap County District  
19 Court issued an Order of Release and Setting Court Dates on the charge. *Id.* at 12. On  
20 January 19, 2016, the charge was dismissed on Taylor’s motion. Dkt. 25 at 4; Dkt. 8, ¶  
21  
22

1 19. The citation VanGesen had issued was dismissed after Taylor showed proof of  
2 insurance and proof that the tail light cover had been repaired. Dkt. 1, ¶ 123.<sup>2</sup>

### 3 III. DISCUSSION

#### 4 A. Taylor's Motion to Strike

5 While Taylor asks the Court to strike the Declaration of John C. Purves submitted  
6 in support of VanGesen's motion to dismiss, he primarily contests whether the Court may  
7 take judicial notice of their contents. Dkt. 24. The declaration includes the criminal  
8 complaint Kitsap County filed against Taylor on October 14, 2015, charging him with  
9 one count of obstructing a law enforcement officer based on the September 13, 2015  
10 incident (which includes VanGesen's incident report) and an Order of Release and  
11 Setting Court Dates from the Kitsap County District Court which Purves declares was  
12 issued after the District Court determined probable cause existed for the obstruction  
13 charge. *Id.*<sup>3</sup> The declaration includes a request that the Court take judicial notice of these  
14 documents as court records. Dkt. 20, ¶ 3.

15 "A judicially noticed fact must be one not subject to reasonable dispute in that it is  
16 . . . capable of accurate and ready determination by resort to sources whose accuracy  
17

---

18 <sup>2</sup> In support of his motion, VanGesen submits the Declaration of John C. Purves, Dkt. 20.  
19 The declaration and its two supporting exhibits include the Kitsap County criminal complaint  
20 and the Kitsap County District Court Order of Release and Setting Court Dates. *Id.* The  
21 declaration is further addressed in the section on Taylor's motion to strike.

22 <sup>3</sup> While Taylor questions whether the incident report was actually part of the court record,  
Dkt. 24 at 2, VanGesen submitted another declaration from counsel in support of his reply  
affirming that the incident report was attached to the filed charging document and served as the  
statement of probable cause, Dkt. 27, ¶ 4. The Court finds no reason to doubt the veracity of this  
declaration and Taylor did not surreply.

1 cannot reasonably be questioned.” Fed. R. Evid. 201(b). A court can take judicial notice  
2 of “matters of public record.” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir.  
3 2001). The Court finds that Taylor is correct that the *existence* of these documents is  
4 subject to judicial notice as court records but the facts within them are disputed and not  
5 subject to judicial notice. Dkt. 24 at 3–5. Moreover, disputed facts are not considered  
6 evidence on a motion for judgment on the pleadings.

7 VanGesen argues that the Court should disregard the motion to strike because  
8 Local Rule 7(g) provides that requests to strike material shall not be presented in separate  
9 motions and shall be instead contained in the responsive brief. Dkt. 26 at 1 (citing Local  
10 Rules W.D. Wash. LCR 7(g)). While VanGesen correctly represents the local rule, the  
11 Court finds that his argument is moot because the Court would consider exhibits  
12 submitted in support of a motion under the standard for judicial notice with or without  
13 Taylor’s motion.

14 Therefore, the Court denies the motion to strike as moot and will consider the  
15 relevant facts according to the legal standard for judicial notice.

16 **B. Standard on Motion for Judgment on the Pleadings**

17 “After the pleadings are closed – but early enough not to delay trial – a party may  
18 move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). The pleadings are closed for  
19 purposes of Rule 12(c) once a complaint and answer have been filed. *Doe v. United*  
20 *States*, 419 F.3d 1058 (9th Cir. 2005). “Analysis under Rule 12(c) is ‘substantially  
21 identical’ to analysis under Rule 12(b)(6) because, under both rules, a court must  
22 determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to

1 a legal remedy.” *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir.  
2 2015) (quoting *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012)).

3 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil  
4 Procedure may be based on either the lack of a cognizable legal theory or the absence of  
5 sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*, 901  
6 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the  
7 complaint is construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301  
8 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed  
9 factual allegations but must provide the grounds for entitlement to relief and not merely a  
10 “formulaic recitation” of the elements of a cause of action. *Bell Atlantic Corp. v.*  
11 *Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs must allege “enough facts to state a claim  
12 to relief that is plausible on its face.” *Id.* at 570.

### 13 **C. Merits of Constitutional Claims**

14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege a violation of  
15 constitutional or federal statutory rights proximately caused by a person acting under  
16 color of state law. *Crumpton v. Gates*, 947 F.2d 1418, 1421 (9th Cir. 1991). The parties  
17 do not dispute that VanGesen acted under color of state law. Taylor alleges the traffic  
18 stop violated his Fourteenth and Fourth Amendment rights and alleges the arrest violated  
19 his First Amendment rights. Dkt. 1, ¶¶ 124–26.

20 VanGesen devotes the bulk of his motion to argument that Taylor has failed to  
21 plead facts sufficient to demonstrate any violation of his constitutional rights rather than  
22



1 focusing on qualified immunity. Therefore, the Court will also focus its analysis on  
2 whether the facts alleged are sufficient to state a constitutional claim.

3 **1. Equal Protection Under the Fourteenth Amendment**

4 A plaintiff bringing an equal protection claim must show intentional  
5 discrimination based upon the plaintiff's membership in a protected class. *Serrano v.*  
6 *Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003). "To succeed on a § 1983 equal protection  
7 claim, the plaintiffs must prove that the defendants acted in a discriminatory manner and  
8 that the discrimination was intentional." *Reese v. Jefferson School Dist. No. 14J*, 208  
9 F.3d 736, 740 (9th Cir. 2000) (citing *Fed. Deposit Ins. Corp. v. Henderson*, 940 F.2d 465,  
10 471 (9th Cir. 1991)). "Intentional discrimination means that a defendant acted at least in  
11 part *because of* a plaintiff's protected status." *Maynard v. City of San Jose*, 37 F.3d  
12 1396, 1404 (9th Cir. 1994) (emphasis in original). "To prevail on an equal protection  
13 claim under the 'Fourteenth Amendment, a plaintiff must demonstrate that enforcement  
14 had a discriminatory effect and the police were motivated by a discriminatory purpose."  
15 *Lacey v. Maricopa Cty.*, 693 F.3d 896, 920 (9th Cir. 2012) (quoting *Rosenbaum v. City &*  
16 *Cty. of S.F.*, 484 F.3d 1142, 1152 (9th Cir. 2007)). "In order to prove a discriminatory  
17 effect, 'the claimant must show that similarly situated individuals . . . were not  
18 prosecuted.'" *Id.* (quoting *United States v. Armstrong*, 517 U.S. 456, 465 (1996)).

19 Taylor argues that plaintiffs in equal protection civil cases, unlike defendants in  
20 criminal cases alleging selective prosecution, do not have to allege or prove  
21 discriminatory effect. Dkt. 25 at 12. Taylor asks the Court to adopt the reasoning of the  
22 district court in *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131, 1140 (N.D. Cal.

2000), which concluded that civil plaintiffs may properly state an equal protection claim based on a traffic stop without alleging discriminatory effect, i.e. without alleging similarly situated white motorists were not stopped. Dkt. 25 at 12. In *Rodriguez*, the district court found that showing similarly situated motorists were not stopped could be an impossible requirement because “[i]t is highly doubtful that Defendants or any other law enforcement agency maintain records identifying law-abiding individuals who are not stopped.” *Rodriguez*, 89 F. Supp. 2d at 1141. The district court found that alleging that the defendants acted with discriminatory intent, that the defendants knew about but refused to stop racially discriminatory practices of their officers, and that statistical evidence and other facts existed which if proved would support an inference of discriminatory intent sufficiently stated an equal protection claim. *Id.*

The Court declines to excuse the requirement to allege discriminatory effect in this case for two reasons. First, the allegations the district court relied on in *Rodriguez* to find the complaint sufficiently stated a claim—discriminatory intent, knowledge of and refusal to stop discriminatory practices, and statistical evidence of discriminatory intent—could if proven also support a finding of discriminatory effect. *Id.* Second, Taylor does not cite other caselaw distinguishing between civil and criminal equal protection claims in this way, and the Ninth Circuit has more recently applied the discriminatory effect pleading requirement to civil plaintiffs despite noting its demanding standard. *See Lacey*, 693 F.3d at 920 (explaining that while proving discriminatory effect may be difficult, a plaintiff may state a claim by alleging only the existence of anecdotal or statistical facts).

1 The Court thus concludes that Taylor has failed to plead facts to support an  
2 element of his claim, and grants judgment on the pleadings as to Taylor’s Fourteenth  
3 Amendment claim. Because it is not clear that Taylor’s complaint may not be cured by  
4 amendment, the Court grants Taylor leave to amend.

## 5 **2. Unreasonable Search and Seizure Under the Fourth Amendment**

6 “An officer may not detain a motorist without a showing of reasonable suspicion,  
7 which is ‘a particularized and objective basis for suspecting the particular person stopped  
8 of criminal activity.’” *United States v. Jimenez-Medina*, 173 F.3d 752, 754 (9th Cir.  
9 1999) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). “A seizure for a  
10 traffic violation justifies a police investigation of that violation.” *Rodriguez v. United*  
11 *States*, 125 S. Ct. 1609, 1614 (2015).

12 It is undisputed that VanGesen told Taylor the reason for the traffic stop was a  
13 broken taillight and that the taillight was in fact broken. Taylor alleges VanGesen did not  
14 discover the taillight was broken until well after VanGesen initiated the stop—  
15 specifically, not until VanGesen searched the car after he arrested Taylor. Dkt. 1, ¶ 102.  
16 The parties dispute whether this allegation is plausible.

17 VanGesen argues that Taylor submits only conclusory allegations and statements  
18 of opinion in support of his allegation. Dkt. 19 at 7. Taylor alleges the following facts in  
19 support of his contention that VanGesen could not have observed the taillight at the time  
20 VanGesen contends that he did: (1) the vehicles were travelling in opposite directions, (2)  
21 when the vehicles passed, it was still daylight and the sun would not set for at least  
22 another twenty-four minutes, (3) each vehicle was travelling approximately 30 to 35 mph,

1 (4) in daylight without activating the brake light, the missing piece of the cover would not  
2 be visible “unless a person was closer than 20 feet and had more than a fraction of a  
3 section [sic] to look at the rear of the Taylor car.” Dkt. 25 at 13; Dkt. 1, ¶¶ 9–11, 29–30,  
4 34.

5 These facts create a plausible inference that VanGesen did not observe the  
6 missing piece of the taillight until after the stop and thus executed a traffic stop without  
7 reasonable suspicion. Therefore, the Court denies VanGesen’s motion as to Taylor’s  
8 Fourth Amendment claim.

### 9 **3. Free Speech Under the First Amendment**

10 The First Amendment generally “prohibits government officials from subjecting  
11 an individual to retaliatory actions’ for engaging in protected speech.” *Nieves v. Bartlett*,  
12 139 S.Ct. 1715, 1722 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). The  
13 retaliatory motive must be the but-for cause of the plaintiff’s injury. *Id.* (citing *Hartman*,  
14 547 U.S. at 260). When a plaintiff alleges retaliatory arrest, the absence of probable cause  
15 “generally provide[s] weighty evidence that the officer’s animus caused the arrest,  
16 whereas the presence of probable cause will suggest the opposite.” *Id.* at 1724. A plaintiff  
17 alleging retaliatory arrest must generally plead and prove the absence of probable cause  
18 but may alternatively “present objective evidence that he was arrested when otherwise  
19 similarly situated individuals not engaged in the same sort of protected speech had not  
20 been.” *Id.* at 1723–24, 1727.

21 Taylor argues that VanGesen had no probable cause to arrest him for obstruction  
22 because he complied with VanGesen’s instructions to get out of the car, walk to the back,

1 and submit to a pat-down. Dkt. 25 at 17–18 (citing Dkt. 1, ¶¶ 61–70). Taylor alleges that  
2 he was arrested only after he implied that the stop was based on race through his  
3 statement that “we both know this isn’t about the brake light,” and for twice objecting to  
4 VanGesen’s excessive use of force. In his motion, VanGesen argues the only way to  
5 interpret Taylor’s pled facts is to find probable cause existed and the arrest was not based  
6 on Taylor’s speech. Dkt. 19 at 8. The Court finds that as Taylor plausibly alleges he  
7 complied with VanGesen’s instructions, Taylor has plausibly alleged that he was arrested  
8 without probable cause. Having plausibly alleged a lack of probable cause, actual  
9 causation of the arrest becomes a question of fact, and so Taylor has sufficiently alleged  
10 VanGesen arrested him based on protected speech.

11 Therefore, the Court denies VanGesen’s motion on Taylor’s First Amendment  
12 claim.

#### 13 **D. Qualified Immunity**

14 “Government officials performing discretionary functions enjoy qualified  
15 immunity from civil damages so long as their conduct does not violate ‘clearly  
16 established statutory or constitutional rights of which a reasonable person would have  
17 known.’” *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1314 (9th Cir. 1989) (quoting  
18 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Under qualified immunity, a public  
19 official is protected from suit when he or she “makes a decision that, even if  
20 constitutionally deficient, reasonably misapprehends the law governing the  
21 circumstances.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). It protects “all but the  
22

1 plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S.  
2 335, 341 (1986).

3 “Qualified immunity is an immunity from suit rather than a mere defense to  
4 liability.” *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (quotation marks omitted).  
5 Accordingly, to adequately plead a claim against such government officials, plaintiffs  
6 bear the burden of pleading facts that demonstrate that a violation of a right that was  
7 clearly established at the time of the alleged misconduct. *See id.* The Supreme Court has  
8 repeatedly held that clearly established law may not be defined “at a high level of  
9 generality.” *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *D.C. v. Wesby*, 138 S.  
10 Ct. 577, 589 (2018); *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015).  
11 Instead, courts must look at the “particular context” at issue and determine the question  
12 within the “specific context” of the case. *See Mullenix v. Luna*, 136 S. Ct. 305, 308  
13 (2015).

14 Regarding qualified immunity to Taylor’s Fourteenth Amendment and Fourth  
15 Amendment claims, VanGesen argues that Taylor would have to prove “initiating a  
16 traffic stop for an equipment malfunction on a motor vehicle operated by a person of a  
17 different race” violates clearly-established rights. Dkt. 19 at 10. This clearly  
18 mischaracterizes Taylor’s position. Taylor does not argue police may not stop motorists  
19 of another race for legitimate traffic infractions. Taylor alleges VanGesen had no reason  
20 to suspect he had committed a traffic infraction and instead stopped him based only on  
21 his race. Dkt. 1, ¶¶ 124–25. It appears that as alleged VanGesen’s actions would violate  
22 the clearly-established right under the Fourteenth Amendment not to be stopped by police

1 based only on race, *see, e.g., Farm Labor Organizing Comm. v. Ohio State Highway*  
2 *Patrol*, 308 F.3d 523, 542 (2002) (clearly established in 1992 that the Constitution  
3 prohibits racial targeting in law enforcement investigations), and the clearly-established  
4 right under the Fourth Amendment not to be seized without reasonable suspicion, *see,*  
5 *e.g., Jimenez-Medina*, 173 F.3d at 754.

6       Regarding qualified immunity to Taylor’s First Amendment claim, VanGesen  
7 argues that there was probable cause to arrest Taylor for obstructing an officer. Dkt. 19 at  
8 10. However, that conclusion would require the Court to find that Taylor’s position, that  
9 no probable cause existed, is implausible. Notwithstanding VanGesen’s argument that the  
10 Kitsap County District Court found probable cause, the Court finds it is plausible that as  
11 alleged, Taylor complied with VanGesen’s commands to the point that probable cause for  
12 arrest was not present and so Taylor was arrested on the basis of his protected speech.  
13 Arrest only on the basis of protected speech violates clearly established First Amendment  
14 rights. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 462–63 (“The freedom of individuals  
15 verbally to oppose or challenge police action without thereby risking arrest is one of the  
16 principal characteristics by which we distinguish a free nation from a police state.”).

17       Therefore, the Court finds that VanGesen has not shown he is entitled to qualified  
18 immunity.

#### 19                                   IV. ORDER

20       Therefore, it is hereby **ORDERED** that VanGesen’s motion for judgment on the  
21 pleadings, Dkt. 19, is **GRANTED in part and DENIED in part**, Taylor’s motion to  
22

1 strike, Dkt. 24, is **DENIED as moot**, and Taylor is **GRANTED leave to amend** and  
2 shall file an amended complaint no later than October 18, 2019.

3 Dated this 8th day of October, 2019.

4  
5 

6 BENJAMIN H. SETTLE  
7 United States District Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22